SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1211

OWENSBORO-DAVIESS COUNTY HOSPITAL, a corporation; CITY OF OWENSBORO, KENTUCKY and DAVIESS COUNTY, KENTUCKY - - Petitioners

versus

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor - - Respondent

Brief For Kentucky Hospital Association *Amicus Curiae*, in Support of Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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TABLE OF CONTENTS

	PAGE
Table of Citations	ii
Opinions Below	2
Jurisdiction	2
Question Presented for Review	2
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ—The Equal Pay Act is a Vitally Important Piece of Federal Law, the Proper Interpretation of Which Should Be Settled by the Supreme Court	6
Conclusion	16
Appendix A—Consent to File Amicus Curiae Brief	1a–2a
Appendix B—Court of Appeals Decision Below	3a–39a
Appendix C—District Court Decision Below	40a–46a
Certificate of Service	47a

TABLE OF CITATIONS

	PAGE
Brennan v. Cenco Hospital & Convalescent Homes, Corp., 71 LC 32,908, 21 WH 29 (SD Tex. 1973)..	5
Brennan v. Prince William Hospital Corporation, 503 F. 2d 282 (4 Cir. 1974), Cert. denied, 420 U. S. 972 (1974).	14
Brennan v. St. Luke Hospital, 72 LC 32,969, 21 WH 392 (ED Ky. 1973).	5
Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F. 2d 1256 (5 Cir. 1972)	14– 15
Hodgson v. Good Shepherd Hospital, 327 F. Supp. 143 (ED Tex. 1971).	5
Hodgson v. Kaukini Hospital & Home, 73 LC 32,014 (D. Haw. 1974).	5
Hodgson v. St. Elizabeth Hospital, 70 LC 32,863, 20 WH 1242 (ED Ky. 1973)	5
Hodgson v. Skyvue Terrace, Inc., 68 LC 32,699, 20 WH 754 (WD Pa. 1972).	5
Hodgson v. William and Mary Nursing Hotel, 65 LC 32,497, 20 WH 10 (MD Fla. 1971)	5, 7
Shultz v. Kentucky Baptist Hospital, 62 LC 32,296, 19 WH 403 (WD Ky. 1969)	5

BLEED THROUGH

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The Petitioners, Owensboro-Daviess County Hospital, City of Owensboro, Kentucky and Daviess County, Kentucky (hereinafter collectively called "Petitioners") have requested that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 30, 1975. The *amicus curiae,* the Kentucky Hospital Association, for the reasons hereinafter stated, supports that request and prays that the writ issue. Pursuant to Rule 42 of the Supreme Court's Rules, both the Petitioners and the

Respondent have consented to the filing of this brief by the *amicus curiae*. Copies of the consents appear in Appendix A, hereto.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit not yet reported, and the Findings of Fact, Conclusions of Law and Judgment of the District Court for the Western District of Kentucky, appear in the Appendices B and C hereto, respectively.

II

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 30, 1975. A timely petition for rehearing en banc was denied on December 2, 1975, and the Petitioner's petition for writ of certiorari will be filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III

QUESTION PRESENTED FOR REVIEW

In this action the Secretary of Labor (hereinafter called the "Secretary") alleged that the Petitioners paid female nurses aides at an hourly rate less than male orderlies for "equal work" in violation of the Equal Pay Act of 1963 (hereinafter sometimes called the "Act"). The question for review is as follows:

BLEED THROUGH

> Whether the proper standard for determining "equal work" under the Equal Pay Act of 1963, requires a determination that the affected employees do substantially the same jobs, the performance of which requires equal skill, effort, and responsibility, or a determination that the jobs which the affected employees perform requires substantially the same skill, effort and responsibility?

It is the position of the *amicus* that the proper standard for determining "equal work" under the Equal Pay Act of 1963, requires a determination that the affected employees do substantially the same jobs, the performance of which requires equal skill, effort, and responsibility.

IV

STATUTORY PROVISIONS INVOLVED

The Act was enacted as an amendment to the Fair Labor Standards Act of 1938 adding the principal of equal pay for equal work regardless of sex. The part of the Act involved here is codified in 29 U.S.C. §206-(d)(1) as follows:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment

is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

V

STATEMENT OF THE CASE

The Kentucky Hospital Association (the "Association"), the *amicus curiae,* is a non-profit corporation organized under the laws of Kentucky. One hundred thirty hospitals licensed in Kentucky, are members of the Association, representing in excess of ninety-nine percent (99%) of all Kentucky hospitals. In 1973, those hospitals employed 6,774 female nurses aides, and 1,068 male orderlies, or a ratio in excess of 6 aides to 1 orderly.[1] The Association is an affiliate of the American Hospital Association, a national hospital association. In 1974, 7,174 hospitals were affiliated with the American Hospital Association.[2]

Historically, in Kentucky, and on a national scale, hospitals have employed fewer male orderlies than female aides, historically orderlies have had different, although necessarily related, job functions than aides, and historically orderlies have been paid higher wages

[1]Based on an interpolation of a Wage and Salary survey conducted by the Kentucky Hospital Association of member hospitals for calendar year 1973.

[2]Based on membership information supplied by the American Hospital Association.

BLEED THROUGH

than aides. The difference in wage rates has been based upon job differences—not upon sex differences.

The Secretary brought this action, which is similar to the numerous other actions brought by it in and out of the State of Kentucky, in the United States District Court for the Western District of Kentucky to enjoin the Petitioners from violating the Act's equal pay provisions.[3]

The District Court, without a jury, determined that the Secretary failed to prove that female aides and male orderlies do "equal work". The Court of Appeals reversed the District Court holding that the Findings of Fact were "clearly erroneous" and based upon "an incorrect interpretation of the Equal Pay Act". Implicit in the Appellate Court's reversal of the District Court's Findings of Fact is the Appellate Court's determination that the District Court incorrectly interpreted the law.

The only interpretation of the Equal Pay Act which can be gleaned from the District Court's Conclusions of Law, is that the District Court considered that when males and females perform a different type of work, requiring different skills, the Equal Pay Act is not

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[3]Examples of such cases are reported as follows: *Brennan* v. *Cenco Hospital and Convalescent Homes Corp.*, 71 LC 32, 908, 21 WH 29 (SD Tex. 1973); *Hodgson* v. *Good Shepherd Hospital*, 327 F. Supp. 143 (ED Tex. 1971); *Hodgson* v. *St. Elizabeth Hospital*, 70 LC 32,863, 20 WH 1242 (ED Ky. 1973); *Hodgson* v. *Skyvue Terrace, Inc.*, 68 LC 32,699, 20 WH 754 (WD Pa. 1972); *Hodgson* v. *William and Mary Nursing Hotel*, 65 LC 32,497, 20 WH 10 (MD Fla. 1971); *Shultz* v. *Kentucky Baptist Hospital*, 62 LC 32,296, 19 WH 403 (WD Ky., 1969); *Hodgson* v. *Kaukini Hospital & Home*, 73 LC 32,014 (D. Haw., 1974); and *Brennan* v. *St. Luke Hospital*, 72 LC 32,969, 21 WH 392 (ED Ky. 1973).

violated by differing compensation.[4] On the other hand, the Sixth Circuit did not look to the differences in job duties and responsibilities, but rather made an overall determination of whether, in its judgment, the work performed by aides was "substantially equal work". In other words, it made a management decision which the Equal Pay Act clearly leaves to private enterprise.

VI

REASONS FOR GRANTING THE WRIT

The Equal Pay Act is a Vitally Important Piece of Federal Law, the Proper Interpretation of Which Should be Settled by the Supreme Court.

The Equal Pay Act, in very succinct language prohibits pay discrimination based on sex "for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." It is difficult to understand how these words can be tested under a criteria which only measures whether, in the judgment of the Secretary, or the Court, the work performed by one group of employees is substantially equal to the work performed by another group of employees.

It is not often that the legislative history concerning the choice of statutory wording is as clear as it is in this instance. But here the legislative history clearly demonstrates that the choice of wording was inten-

[4]Findings of Fact, Conclusions of Law and Judgment, "Conclusions of Law" No. 3, Appendix C, p. 45a.

BLEED THROUGH

tional, and it clearly demonstrates the intention that the wording be given common application. Insofar as the proper interpretation of the wording is concerned, a colloquy between Congressman Goodell (Rep., New York) and Congressman Griffin (Rep. Mich.) and Congressman Thompson (Dem., N.J.), three of the managers of the Bill on the House Floor, made very clear the intent of Congress:[5]

> Mr. Griffin: * * *
>
> The first such amendment, it will be recalled was offered by the gentlelady from New York [MRS. ST. GEORGE] who called for the use of the term "equal work" rather than "comparable work." It will be recalled that the House adopted her amendment last year.
>
> This bill today speaks in terms of equal work. We go further in this legislation and provide some definition as to what equal work is—what is meant by equal work. The bill refers to jobs, the performance of which require equal skill, equal effort, equal responsibility, and which are performed under similar working conditions.
>
> MR. THOMPSON of New Jersey. Will the gentleman yield?
>
> MR. GRIFFIN. I yield to the gentleman from New Jersey.
>
> MR. THOMPSON of New Jersey. I am very glad that the gentleman is taking care to explain this. I believe in addition to the gentleman from New

[5]The colloquy is quoted by the Court in *Hodgson* v. *William and Mary Nursing Hotel*, 65 LC 32,497 (MD Fla., 1971) at pages 44,784-44,785.

York [MR. GOODELL] that the gentleman deserves a little credit, too, because this particular section or definition of "equal work" was a bothersome one last year. I think that the contribution which the gentleman made in adding these other factors and, rather specific ones, to it is a most valuable contribution.

MR. GRIFFIN. I thank the gentleman from New Jersey.

MR. GOODELL. Mr. Chairman, will the gentleman yield?

MR. GRIFFIN. I yield to the gentleman from New York.

MR. GOODELL. I also want to commend the gentleman for the very hard work which he did. I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.

We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and

BLEED THROUGH

working conditions, is intended to make this point very clear.

MR. GRIFFIN. In other words, would the gentleman agree with me that there would be no basis for comparing, say, an inspector with an assembler, for example? The Department of Labor could not say, "Well, now, these two jobs involve about the same level of skill and the same degree of responsibility." It would be appropriate to compare inspectors with inspectors, or assemblers with assemblers, but not to compare an inspector with an assembler.

MR. GOODELL. We are talking about jobs that involve the same quantity, the same size, the same number, where they do the same type of thing, with an identity to them.

MR. GRIFFIN. In addition, it would be clear that in comparing inspectors, if one inspects a complicated part of an engine, for example, while another inspector makes only a cursory type of inspection, obviously, the fact that both are inspectors would not mean that they should necessarily receive equal pay.

MR. GOODELL. I agree with the gentleman. I wish the gentleman would yield on that point to the chairman of the subcommittee, who made that very point yesterday to the Rules Committee.

MR. THOMPSON of New Jersey. I do agree with what the gentleman said thus far. The gentleman said the Department of Labor could not, where these differences exist, make such determinations. There are two protections. First of all, the Department is not given that broad discretion and is deliberately restricted in the act to the definition set forth in the act.

MR. GRIFFIN. I am very glad to have that important contribution.

MR. THOMPSON of New Jersey. In the event in a very close matter they charge discrimination, it would be incumbent upon them to establish that before a Federal judge. Futher, in the case of inspectors, someone asked hypothetically yesterday, Suppose they are doing the same work but one of them at the end of the line lifts the parts and carries them away? Obviously this comes under what we construe to be effort involved. It is an additional matter which clearly obliterates any question that they would be the same.

MR. GRIFFIN. I thank the gentleman for that important comment.

MR. GOODELL. I think the point made by the chairman of the subcommittee is important. We discussed earlier the regulatory power. The Secretary may believe that a violation exists but the court will make a second independent judgment. That is very significant. We are not allowing the Secretary of Labor to make decisions which excluded the court from an independent new interpretation of this act, as to whether the words we use are being administered reasonably and properly.

MR. THOMPSON of New Jersey. Indeed, we are not granting any such authority, but the fact is that we are specifically and categorically restricting it so that this is a negative action rather than a positive one.

MR. GOODELL. I would like to pursue the point about differences in efforts of employees. This is

BLEED THROUGH

perhaps the broadest category we are talking about in comparing jobs.

It should be understood to be a very broad concept. This could involve a great many factors in terms of personal evaluation of continuous performance on the job, if an employee has demonstrated over a period of time that his performance exhibits more effort in the opinion of the supervisor, then a differentiation in pay will be justified. It also may include such factors as willingness exhibited by the employee and by his actions to expend extra effort and to expend a little extra energy. It should be understood that it is not necessarily that the job requires extra effort, but it may be that an employee expends extra effort so that the performance of the employee on the job justifies a special consideration in terms of his pay.

If I may conclude on just that point: It is our intention, I believe, on both sides of the aisle to provide here with the use of the terms "effort", "skill", "responsibility" and "working conditions" a maximum area for the interplay of intangible factors that justify a measurement which does not have to be given a point-by-point evaluation. In this concept, we want the private enterprise system, employer and employees and a union, if there is a union, and the employers and employees if there is not a union to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.

MR. GRIFFIN. So long as pay differentials are not based on sex.

MR. GOODELL. Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction. . . .

In the instant case, the Sixth Circuit has misinterpreted the law in exactly the fashion feared by Congress. As each of the three Congressional Managers attempted to make clear, the Equal Pay Act should only be applicable where the jobs involved are "virtually identical"—"alike or closely related to each other"—not merely "comparable." The Sixth Circuit has allowed the Department of Labor to successfully say "Well, now, these two jobs involve about the same level of skill and the same degree of responsibility."

In reaching its decision, the Sixth Circuit first acknowledged its complete adoption of the Secretary's views when it stated (see Appendix B, p. 32a):

> Our interpretation of the Equal Pay Act corresponds to that of the agency charged with its enforcement. Although agency interpretation is not controlling, it is entitled to great weight, and in this instance we find it well-reasoned and persuasive.

From that point forward, the Sixth Circuit never clearly delineates the standard it used in the decision making process, but, the entire tenor of the decision making process is encapsulized in the statement:

> "Appellant [Secretary] has demonstrated that the aides who performed sterile procedures through October 1, 1972, were required to have substantially the same skill, to exert substantially the same effort, and to assume substantially the same responsibilities under identical working conditions" (Appendix B, p. 37a).

BLEED THROUGH

This type of rhetoric sounds fine, but the problem is that it is simply the wrong test, because it puts emphasis on whether the employees have substantially equal capabilities, not whether they perform substantially the same job, *which job requires* equal skill, effort and responsibility. Simply stated, the test applied allowed the Secretary to do the one thing Congress feared, let the Department of Labor say "Well now, these two jobs involve about the same level of skill and the same degree of responsibility"—*ipso facto*—equal work.

The Supreme Court should hear this case because the Sixth Circuit has interpreted a federal law in a clearly erroneous manner. While in the instant case, because aides and orderlies do perform comparable work, the distinction between the proper and improper standard may be subtle in wording, the distinction is devastating in total analytical approach.

The fact that the Sixth Circuit found that orderlies perform some duties not performed by aides, which duties it considered as insignificant, is not nearly as significant as the analytical process utilized by the Sixth Circuit in reversing the District Court on specific findings of fact. The reversals were based on the Sixth Circuit's conclusion that some aides possessed the ability to do work performed by orderlies, or that some work performed by orderlies was (based on the Secretary's lack of evidence) infrequently performed by orderlies. That type of reasoning begs the question. The question is were the jobs of aides and orderlies different, or the same?

The District Court found that the jobs were different. The Sixth Circuit found that aides and orderlies possess substantially the same skill, utilize substantially the same effort, and have substantially the same responsibility. Evidence of individual skill and ability may be relevant in a hiring or promotion discrimination claim, but not in an equal pay determination. The test should not be whether aides and orderlies in fact possess substantially equal skill, utilize substantially equal effort, or have substantially equal responsibility. The test is whether they have equal jobs, and in the performance of the equal jobs they are required to utilize equal skill, effort and responsibility.

The Fourth Circuit has adopted the same test as that announced by the Sixth Circuit. In *Brennan* v. *Prince William Hospital Corporation,* 503 F. 2d 282 (4th Cir. 1974), Cert. denied 420 U. S. 972, the Court's decision turned on the same substantially equal test. There the Court stated, at page 291:

> In sum, the work performed by aides and orderlies is not identical. But, as we have previously held, application of the Equal Pay Act is not restricted to identical work. *Hodgson* v. *Fairmont Supply Co.,* 454 F. 2d 490, 493. The basic routine tasks of the aides and orderlies are equal. The variations that the district court found, when tested by the Act's standard of "equal skill, effort and responsibility," do not affect the substantial equality of their overall work.

The only reported decision which approaches a correct interpretation of the law is *Hodgson* v. *Golden*

BLEED THROUGH

Isles Convalescent Homes, Inc., 468 F. 2d 1256 (5th Cir., 1972) where the Court pointed out, in an aides-orderlies case, that "[i]t is not merely comparable skill and responsibility that Congress sought to address, but a substantial identity of job functions." *Supra.* 1258.

The Act is an important piece of federal legislation. A Circuit Court opinion erroneously interpreting federal law enforced by an administrative agency, not only affects similar parties in that Circuit, i.e. members of the Kentucky Hospital Association, but affects similar parties nationwide, i.e. all hospitals. Proper interpretation of the Act is vitally important in the hospital industry, and it is vitally important to the general well being of the economy.

Legislative history demonstrates a clear intention for a narrow application of the Act. A clear intention of applicability only when the jobs to be performed are equal, not when the Secretary may assess that persons doing comparable work, possess equal skill, utilize equal effort and have equal responsibility. Unless the jobs are equal, it is not within the province of the Secretary, or the Courts, to decide that persons possessing equal skill, effort and responsibility should be paid equally. That is an economic determination, decided by economic factors.

VII

CONCLUSION

In its *amicus* brief the Kentucky Hospital Association has addressed itself to the one issue raised by Petitioners concerning which the Kentucky Hospital Association has a major interest. The Kentucky Hospital Association believes, however, that all issues raised by the Petitioners are important and should be considered by this Court.

For the reasons herein stated, it is urged that a writ of certiorari should issue to review the judgment and opinion of the U. S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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